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Before the Federal Communications Commission
Washington, D.C. 20554

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In the Matter of	)	
	)	
Toll Free Service Access Codes	)	CC Docket No. 95-155

REPLY TO OPPOSITION TO PETITION FOR RECONSIDERATION OF THE FOURTH REPORT AND ORDER FROM THE OFFICE OF ADVOCACY, UNITED STATES SMALL BUSINESS ADMINISTRATION

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The Office of Advocacy of the United States Small Business Administration ("Advocacy") hereby respectfully submits this Reply to Sprint Communications Company, L.P.'s ("Sprint") Opposition of its Petition for Reconsideration of the Federal Communications Commission's ("FCC" or "Commission") *Fourth Report and Order,* CC Docket. No. 95-155, FCC 98-48, (rel. Mar. 31, 1998), in the above-captioned proceeding. The Office of Advocacy was established by Congress in 1976 by Pub. L. No. 94-305 (codified as amended at 15 U.S.C. §§ 634 a-g, 637) to represent the views and interests of small business within the federal government. Its statutory duties include serving as a focal point for concerns regarding the government's policies as they affect small business, developing proposals for changes in federal agencies' policies and communicating these proposals to the agencies. 15 U.S.C. § 634c(1)-(4). Advocacy also has a statutory duty to monitor and report on the FCC's compliance with the Regulatory Flexibility Act of 1980 ("RFA"), Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified at 5 U.S.C. § 601 et seq.), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996

("SBREFA"), Subtitle II of the Contract with America Advancement Act, Pub. L. No. 104-121, 110 Stat. 857 (1996). 5 U.S.C. § 612(a).

I. Sprint Has Misrepresented Advocacy's Arguments About The Commission's Compliance With The RFA.

Sprint claims that the Commission has not "neglected to fulfill its statutory duty to analyze fully the impact of its rules on small business before it reached a final decision." Sprint Opposition, at 4. As justification for this conclusion, Sprint states that because this rulemaking commenced in 1995, the Commission has had ample time to "consider the merits of a policy of right of first refusal," particularly given two rounds of public comments and replies. *Id.*[1]

First, having sufficient time to do an analysis is distinctly different from taking sufficient time to do one or actually doing one. Second, Advocacy's concerns are that the Commission did not undertake a small business regulatory flexibility analysis during its rulemaking process therefore, doing an impermissible post hoc Final Regulatory Flexibility Analysis ("FRFA") only after it reached a final decision. Advocacy Petition, at 14. The Commission may have considered the merits of the "right of first refusal" and "first-come, first-served" proposals in general, but a complete analysis of how each proposal affects small businesses was not done. The *Fourth Report and Order* and the FRFA is devoid of such discussion regarding several material small business issues. *See generally* Advocacy Petition. The haste to issue the final rules prior to the April 5, 1998, 877 roll out merely

[1] Under SBREFA, the FCC has a statutory duty to also do outreach to small businesses as part of its rulemaking. 5 U.S.C. § 609. However, a FCC Small Business Roundtable with small businesses CEO's across the country was scheduled two days after the release of the *Fourth Report and Order*. Advocacy *Ex Parte* Notification, Apr. 3, 1998 (detailing multiple concerns with the FCC's Toll Free Service Access Codes administration and policies.). Outreach is also judicially reviewable in connection with the judicial review of the FRFA. 5 U.S.C. § 611(a)(11).

compounded this problem as the deliberative process should have taken longer, allowing full consideration of small businesses issues before a final decision had been made.[2] Third, in its Petition for Reconsideration, Advocacy did not argue that the record was incomplete. Quite the contrary. It is unambiguously stated in Advocacy's Petition for Reconsideration that the Commission ignored record evidence, evidence that clearly sets forth the detrimental economic impact that its first-come, first-served policy would have on small business incumbent subscribers and small Responsible Organizations ("RespOrgs"). *Id.* at 3 ("The Commission has violated the [APA] by: 1) failing to explain adequately its decision to adopt a first-come, first-served allocation process and not addressing the concerns of small businesses expressed in the administrative record"); 5 ("the Commission summarily dismissed in this proceeding Advocacy's and other commenters' arguments that the inherent conflict of interest . . . with RespOrg affiliates/subsidiaries provides an unfair advantage over small business subscribers"); 10 ("Advocacy requests that the Commission properly address the trademark and unfair competition issues with full discussion of the opposing views in the administrative record"); 14 ("Advocacy asserts that the Commission ignored material small business concerns on the administrative record)."

If the Commission took the sufficient time to consider small business issues during its deliberative process, then it was required pursuant to the Administrative Procedure Act ("APA") to provide an adequate explanation in the *Fourth Report and Order* that documents such consideration. *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual*

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[2] For additional reasons that support the assertion that the FCC completed its Final Regulatory Flexibility Analysis in a post hoc manner as a means for cursory compliance with the law, see Advocacy Petition, at 14.

Automobile Insurance Co., 103 S. Ct. 2856, 2870 (1983) ("[i]t is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself"). Such a detailed explanation of why the Commission rejected proposals and alternatives is required not only as part of the RFA, 5 U.S.C. § 604, but the APA as well. Given the absence of a complete discussion of small business economic impact for all classes of small businesses affected by this rule, the Commission has not "cogently explain[ed] why it has exercised its discretion in a given manner" and thus, renders its decision arbitrary and capricious. *Motor Vehicle Manufacturers*, 103 S. Ct. at 2869 (emphasis added); *see also International Ladies Garment Workers' Union v. Donovan*, 722 F.2d 795, 814 (D.C. Cir. 1983), *cert denied* 469 U.S. 820 (1984) ("failure to consider such alternatives, and to explain why such alternatives were not chosen, was arbitrary and capricious, in violation of . . . the APA").

Furthermore, although this proceeding commenced in 1995, the Commission has consistently ignored small business concerns from the beginning of this proceeding. The Commission has had a statutory obligation since 1980, pursuant to the RFA, to address the economic burden of its rules on small entities, identify all small entities affected by the rule, and to analyze alternatives that would minimize the burden on small entities.[3] In fact, there are substantial violations of the RFA and APA in the Commission's rulemaking process in the first Notice of Proposed Rulemaking, *In re* Toll Free Service Access Codes, *Notice of Proposed Rulemaking*, 10 FCC Rcd 13692 (1995) ("NPRM"), and *In Re* Toll

[3] Note that the requirements for the Initial Regulatory Flexibility Analysis ("IRFA") have been the same since 1980. 5 U.S.C. § 603. SBREFA was enacted into law into 1996 because regulatory agencies consistently ignored the interests of small businesses and therefore, executed deficient regulatory flexibility analyses - if an analysis was done at all. In addition to more detailed requirements for the FRFA pursuant to SBREFA, 5 U.S.C. § 604, the FRFA is now judicially reviewable. *Id.* § 611(a)(1).

Free Service Access Codes, *Second Report and Order*, 12 FCC Rcd 11162 (1997) (*"Second Report and Order"*). *See generally* Office of Advocacy, *Exparte* Petition for Reconsideration of the *Second Report and Order*, Dec. 12, 1997. Advocacy asserts, *inter alia*, that the NPRM violated the APA because it failed to provide proper public notice of a proposed rule and the IRFA was inadequate because it did not identify all classes of small businesses affected by the rule nor did it provide an analysis of the impact of the proposed rule on small businesses. *Id.* at 3-9.[4] The *Second Report and Order* was also deficient for similar reasons. *Id.* at 10-13. The Commission's action on the Petitions for Reconsideration of the *Second Report and Order* remain pending.

More importantly, it is the unreasonable rules and policies set forth in the *Second Report and Order* that compounds the detrimental impact that the adoption of *the Fourth Report and Order* has on multiple classes of small business. The Commission's over-inclusive and over-broad anti-hoarding and brokering rules provide no remedy for an incumbent toll free subscriber that was harmed during the 877 roll out as a means to recapture that number on the secondary market. *See Fourth Report and Order*, Separate Statement of Commissioner Harold Furchtgott-Roth.

II. Sprint Has No Expertise Nor Sufficient Knowledge To Assess Whether The Commission Has Properly Complied With The RFA Or Not.

Sprint does not have the expertise nor knowledge of the RFA and SBREFA to determine whether the Commission complied with the RFA or not. The U.S. Small Business Administration, through its Office of Advocacy, is uniquely situated as the "RFA watchdog" to determine whether the FCC has fulfilled its statutory duty and has executed

[4] The United States District Court for the District of Columbia recently remanded a final rule on the basis of a RFA violation and lack of proper public notice. *Northwest Mining Ass'n v. Babbitt,* No. CIV A. 97-

a proper analysis. *Southern Offshore Fishing Ass'n v. Daley*, No. 97-1134-CIV-T-23C, 1998 WL 125775, at *19 (M.D. Fla. Feb. 24, 1998). Under the RFA, Congress mandated that the Chief Counsel of Advocacy monitor agency compliance with the RFA. 5 U.S.C. § 612(a). The Chief Counsel must also report annually to the President, the Committees on the Judiciary, and Small Business of the Senate and House of Representatives. *Id.*

In 1996, the Office of Advocacy reviewed approximately 2,500 proposed, interim, and final rules for their impact on small business. The review encompassed a wide range of agencies and wide spectrum of agency compliance. In addition to reviewing rulemaking activity, the Office of Advocacy also meets with regulators, trade associations representatives, and small business to provide guidance and information on the RFA.

Furthermore, the Chief Counsel is empowered by Congress to appear as *amicus curiae* in any action brought in a court of the United States. 5 U.S.C. § 612(b). Pursuant to SBREFA, this authority was expanded to allow the Chief Counsel, in addition to commenting on RFA compliance, to "present his views with respect to. . . the adequacy of the rulemaking record with respect to small entities, and the effect of the rule on small entities." *Id.*

As noted in Advocacy's Petition for Reconsideration, the Commission is required to prepare a regulatory flexibility analysis as a matter of law pursuant to the RFA when there is a "significant economic impact on a substantial number of small entities." Advocacy Petition, at 11 (citations omitted). Based on its extensive knowledge of the statute and RFA compliance, Advocacy asserts that the Commission has not complied with several statutory requirements of the RFA by: 1) failing to consider all small business

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1013 (JLG), 1998 WL 254097 (D.D.C. May 13, 1998).

comments and undertake an analysis of the economic impact of its proposals and final rule on all small entities during the rulemaking process; 2) failing to identify properly, describe, and reasonably estimate the number of all small entities to which these rules will apply; 3) failing to analyze and explain the impact of its final rule on all classes of small business subscribers and small RespOrgs; 4) failure to analyze all significant alternatives to the proposed rule and to provide "a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected." 5 U.S.C. § 604(a)(5) (emphasis added).

III. Sprint's Claims That No New Issues Have Been Raised Since The Adoption Of The Fourth Report And Order Ignores Reality.

Advocacy would not need to address certain issues in its Petition for Reconsideration if the Commission had properly addressed them in the first place. Moreover, there is one new development that proves that the Commission's neglect to address such issues has clearly undermined its stated objective to allocate toll free numbers in an "efficient, fair, and orderly" manner. *Fourth Report and Order*, para. 7.

On Sunday, April 5, 1998, 12 noon, the debut of the new 877 code commenced. However, many small RespOrgs faced a technical problem that prevented access to the database impairing their ability to reserve numbers for their clients. Denise Duclaux, *Firms Scramble for New Toll-Free Code*, DM News, Apr. 13, 1998. The lock-out lasted from 40 minutes to over an hour for some RespOrgs and upon re-entry, 10,000 numbers had been reserved. *Id.; see also 1 877 Disarray*, ICB Toll Free News, Apr. 6 1998. It was also reported that "the computer links of some RespOrgs freed up before others,

enabling them to reserve what was left of their lists of preferred numbers first." Duclaux, DM News. Advocacy and several other small business commenters raised the issue of technical problems and equitable access in *ex parte* comments. Sprint argues that the Commission previously addressed these issues in its *Report and Order* adopted in 1996. Sprint Opposition, at 4-5. However, the "first-come, first-served" policy was not yet adopted then. Therefore, the Commission has not properly addressed this specific issue given its new regulatory requirements. Moreover, Sprint has not explained how the lock-out of access to the 877 database was an "efficient, fair, and orderly" allocation of toll free numbers. Advocacy is also curious how many numbers Sprint was able to secure in "the best interests of its clients" during the same time other RespOrgs were locked out of the database. Sprint Opposition, at 5.

IV. Addressing The Different Types Of Access To The SMS Database Does Not Penalize Large Businesses.

Sprint also alleges that entities (i.e. large businesses) that have invested in a direct access database system are "penalized" if the Commission takes measures to address the technical deficiencies that small entities experience with dial-up access. Sprint Opposition, at 5. The differences in access to the database is not the real issue. It is the "first-come, first-served" policy imposed <u>despite</u> the different and inequitable ways to access the database that is the real problem. Such a policy in light of the obvious technical deficiencies experienced by small businesses in the 877 roll out is simply unreasonable.

The RFA does not seek preferential treatment for small businesses, nor does it require agencies to adopt regulations that impose the least burden on small entities or mandate exemptions for small entities. Rather, it establishes an analytical process for

determining how public issues can best be resolved without erecting barriers to competition. The law seeks a level playing field for small business, not an unfair advantage. To this end, the RFA was designed to place the burden on the government to review all regulations to ensure that, while accomplishing their intended purposes, they do not unduly inhibit the ability of small entities to compete, innovate, or to comply with the regulation. 5 U.S.C. § 601(4)-(5) (emphasis added). Clearly, the database access deficiencies remain a regulatory imposed market entry barrier that impedes competition in the provision of toll free numbers.

V. Sprint's Suggestion That Aggrieved Small Businesses Can Seek Relief By Filing A Complaint With The Commission is Unconscionable.

Sprint also claims that an aggrieved small business harmed by the inherent conflict of interest that Sprint and similar large carriers have, "can file a complaint against the RespOrg which acted improperly." Sprint Opposition, at 5. Yes, there is a complaint process with the Commission. Nonetheless, a complaint would be unnecessary if the Commission's rules were equitable and reasonable. Furthermore, the Commission's complaint process against a RespOrg is insufficient and illusory in providing relief to an aggrieved small business. First, the cost of such action is often very burdensome to small businesses - in money, time, and available resources. Congress recognized that "the failure to recognize differences in the scale and resources of regulated entities has in numerous instances adversely affected competition in the marketplace, discourages innovation and restricted improvements in productivity." 5 U.S.C. § 601(4).

Second, given its position as a major telecommunications corporation, Sprint has to be aware that the Commission has refused to regulate RespOrgs, even those affiliated

with a common carrier such as Sprint. For example, although the Commission acknowledged that American Telegram Corporation's RespOrg was at fault, it declined to take action against the RespOrg. *Fourth Report and Order and Memorandum Opinion and Order*, para. 38 Therefore, in reality the Commission's policy provides no relief nor comfort to a small business harmed by improper RespOrg behavior. Advocacy concurs with the arguments by ICB, Inc. that the anti-discrimination provisions of Title II of the Communications Act of 1934 apply to the allocation and provisioning of telephone numbers - including toll free numbers. ICB, Inc. Comments on Petitions for Reconsideration, June 5, 1998, at 4-5 (citations omitted). RespOrgs should be regulated by the Commission to ensure an "efficient, fair, and orderly" allocation of toll free numbers. Then maybe the complaint process would have some integrity.

VI. Conclusion

As the forgoing comments make clear, Sprint has not adequately supported its opposition to the Office of Advocacy's Petition for Reconsideration and has misrepresented Advocacy's arguments in various statements. Therefore, the Commission should expedite its review of Advocacy's Petition for Reconsideration and grant its requests to revise its allocation process for future toll free code roll outs to eliminate the problems with the "first-come, first served" process.

Respectfully submitted,

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June 15, 1998

CERTIFICATE OF SERVICE

I hereby certify that a copy of the forgoing **Office of Advocacy of the U.S. Small Business Administration Reply to Opposition to Petition for Reconsideration** was hand delivered or sent by first-class mail, postage pre-paid, on the 15th day of June, 1998, to the parties listed below:

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